(1)

91-1022

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CYRIL C. YOUNG, JR., JANE MANNING, JOEL BERGER, STEPHEN NULL, MURRAY LICHTMAN, SYLVIA LICHTMAN and all other persons similarly situated,

Petitioners,

—v.—

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORP., MATSUSHITA ACQUISITION CORP., and MCA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ISSUES PRESENTED FOR REVIEW

1. Does the foreign acquisition of an American mass medium of political information which results in media self-censorship under foreign owners, violate the rights of U.S. citizens and media viewers to gain reasonable access to political information, where high entry barriers to media ownership limit the sources of political information available to U.S. citizens and cumulatively exclude American ownership of the mass media with each successive foreign acquisition?

2. Do the Constitution's inherent rights of national citizenship—which are judicially defined to protect essential features of national citizenship from private as well as official encroachment—provide a cause of action to U.S. citizens seeking to enjoin the foreign acquisition and control of their domestic sources of political information, which are limited in number by high entry barriers to media ownership?

PARTIES BELOW

All petitioners were plaintiffs below. All respondents were defendants below.

There has been one change in the parties. Plaintiff Sandy Berger died on Sept. 13, 1991 and is not a petitioner in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners hereby submit their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

INTRODUCTION

This petition raises an issue of fundamental concern to the role of the American mass media in the American political process. The mass media which play an integral role in setting the nation's political agenda are increasingly the targets of foreign acquisition, resulting in self-censorship by media personnel in deference to new foreign owners. There is no opportunity to replace the foreign acquisitions with American-owned substitutes because high entry barriers to media ownership preclude new entrants. As a result, each foreign acquisition locks-in foreign control of the mass media, with attendant locked-in influence on the American political process and skewed accountability to new owners overseas.

Petitioners are U.S. citizens and viewers of a mass medium whose foreign acquisition they seek to enjoin/divest. Petitioners do *not* seek to impose control of media content nor to interfere with the media's editorial discretion. Petitioners seek only to prevent foreign acquisition of a mass medium where high entry barriers prevent new American-owned entrants and lock-in foreign acquisition/control of the political information accessible to petitioners as U.S. citizens.

Petitioners invoke the Constitution's inherent protections of national citizenship. These protections apply to private as well as governmental conduct and are defined by the federal judiciary to protect the relationship between the national government and its citizens. The mass media are integral to that relationship. In modern society, both government and citizen depend upon mass media to receive information from the

other—as a means by which government informs its citizens and by which citizens petition for redress of grievances. Foreign control of this essential means of government-citizen communication, including foreign control of media content, is intrinsically incompatible with the notion of national citizenship and a responsive political system.

Under this Court's decisions, the inherent rights of national citizenship include the right of U.S. citizens to access their national government in numerous ways: through interstate travel (never mentioned in the Constitution) and through petition for redress of grievances, an inherent right apart from the express petition-guarantee of the First Amendment (pp. 20-22, *infra*). No less than interstate travel and direct petition, citizen accessibility to the national government through mass media, unencumbered by foreign control, is an essential attribute of national citizenship. It is a right which is impaired by foreign acquisitions of mass media where high entry barriers preclude new American-owned entrants to replace each foreign acquisition.

The implications are ominous for the nation's political process. The process is supposed to be responsive to an *American* constituency, achieved through a vigorous media reporting on governmental affairs. But if the media themselves are foreign-controlled and accountable to foreign interests, the political agenda which the media help to define will be skewed from the intended domestic constituencies.

This is inconsistent with the media's function in democratic self-government. "In a society [where] government rests upon the consent of the governed, freedom of the press must be the most cherished tenet". *Edwards v. National Audubon Society*, 556 F.2d 113, 115 (2d Cir. 1977). Self-government means control from within. It makes little sense to exalt a free press as an essential part of democratic self-government and then alienate its ownership to foreign hands. There is an oxymoronic quality to *foreign* ownership of the means of democratic *self*-government.

Neither the Congress nor the marketplace can be relied upon to provide a remedy. Legislative responsiveness often

depends upon the mass media, so that reliance upon the legislature is circular.

Nor can the marketplace provide a remedy. High entry barriers preclude American-owned replacements for foreign acquisitions. And remaining American-owned media are themselves the targets of further acquisitions. To allow foreign acquisitions because still other American-owned media remain would allow a built-in count-down against American ownership, until only a single American owner remained.

This is not a xenophobic response to foreign investment. Rather, the sole concern here is the mass media and its role as an integral part of the process by which the nation's political agenda are made responsive to an American constituency.

OPINIONS AND ORDERS BELOW

The District Court dismissed petitioners' claim on the face of the complaint for failure to state a claim upon which relief may be granted and for want of standing. The District Court's decision is not reported. It was dictated into the record on Dec. 21, 1990 and is included in the appendix at A.5-6.

The Court of Appeals affirmed the dismissal. The Court of Appeals based its affirmance upon the facial merit of the complaint, holding that petitioners do not enjoy the constitutional right asserted. The Court of Appeals did not reach the issue of standing. Its opinion is reported. *Young v. Matsushita Electric Indust. Co.*, 939 F.2d 19 (2d Cir. 1991). It is included in the appendix at A.1-4.[1]

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1 Although not addressed by the Court of Appeals, the issue of standing is addressed briefly herein because it is jurisdictional, going to the Article III jurisdiction of this Court (pp. 26-28, *infra*).

As shown below, the Second Circuit misdescribed petitioners' claim in 2 respects: First, petitioners do not assert a broad right to domestic ownership of all American mass media. Rather, petitioners' asserted right to exclude foreign ownership applies *only* where the entry barriers

Petitioners timely petitioned the Court of Appeals for panel rehearing pursuant to Fed.R.App.P. 40. The Court of Appeals denied the petition. Its order is included in the appendix at A.7-8.

JURISDICTION OF THIS COURT

Petitioners seek review of a judgment of the Court of Appeals affirming the dismissal of their complaint. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Petitioners also having standing under Article III. Although disputed by respondents, the issue of standing was not addressed by the Court of Appeals. Because of its jurisdictional quality, the issue of standing is addressed briefly at the close of this petition (pp. 26-28, *infra*).

This petition is timely. The judgment of the Court of Appeals was entered July 29, 1991. Petitioners timely filed a petition for panel rehearing pursuant to Fed.R.App.P. 40 on Aug. 12, 1991. The Court of Appeals denied the petition for rehearing on Aug. 29, 1991 (A.7-8), and this petition is filed within 90 days. Sup.Ct.R. 13.1, 13.4.

CONSTITUTIONAL PROVISIONS

Petitioners invoke the Constitution's inherent rights of national citizenship. These rights are not expressly mentioned in the Constitution. Rather, they are recognized through adjudication to prevent private or official infringement of the relationship between the national government and its citizens. The mass media are integral to that relationship.

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to media ownership are so extreme as to preclude an American-owned replacement for a foreign acquisition. (A.9,15¶ 29,16-17¶ 37).

Second, the Second Circuit ignored petitioners' allegations (and the common-sense reality) of media self-censorship under foreign owners (A.9,16¶¶ 31-32).

Petitioners timely sought rehearing before the Second Circuit, alerting the Second Circuit to its misdescription of petitioners' claim, which the Second Circuit denied (A.7-8).

This Court has recognized inherent rights of national citizenship in numerous decisions. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (inherent right of interstate travel, never mentioned in Constitution); *U.S. v. Guest*, 383 U.S. 745, 758 (1966) (same); *Oyama v. California*, 332 U.S. 633, 647 (1948) (inherent "right of American citizens to own land anywhere in the United States"); *Hague v. CIO*, 307 U.S. 496, 512 (1939) (apart from First Amendment, "the right peaceably to assemble to discuss [national] topics . . . is a privilege inherent in citizenship of the United States") (Black & Roberts, JJ, conc'g); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (right to petition Congress, and other inherent rights cataloged); *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1875) (right to petition Congress protected as inherent right of national citizenship, apart from First Amendment).

STATEMENT OF THE CASE[2]

Petitioners sue to enjoin/divest the foreign acquisition of an American-owned mass medium, where high entry barriers to media ownership preclude an American-owned replacement for the foreign acquisition.

Petitioners are U.S. citizens who are viewers of motion pictures distributed in the United States by respondent MCA, Inc. (A.11). Petitioners receive important political information and viewpoints from film. As this Court has recognized, motion pictures, no less than standard news fare, are important and viable sources of information regarding government and public issues. This is true for petitioners and for millions of Americans. For many persons, motion pictures may be a more enduring and significant source of political information than standard news media. The principles of journalistic independence which apply to the conventional

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2 The facts are taken from petitioners' amended complaint (A.9-18) and from the declaration of petitioners' media/economics expert Dr. Douglas Gomery (A.19-34) which the amended complaint incorporates by reference (A.15). Fed.R.Civ.P. 10(c). Because the amended complaint was dismissed on its face, its allegations must be taken as true.

news media apply to motion pictures as well (pp. 17-19, *infra*).

Until this litigation, respondent MCA, Inc. ("MCA") owned Universal Pictures, one of 7 major distributors of motion pictures in the United States (A.19,33). These 7 major distributors collectively account for more than 90% of film revenues. The entry barriers are extreme: With a single exception attributable to the demise of RKO in the 1950's, the 7 major distributors who controlled film distribution at the advent of sound in the 1930's still control it today (A.19,25-28).

Respondent Matsushita Electric Industrial Co., Ltd., is a Japanese corporation which manufactures electronics and appliances (A.12). It owns the "Panasonic" and "Quasar" trademarks. Respondents Matsushita Holding Corp. and Matsushita Acquisition Corp. (collectively "Matsushita") are its wholly-owned subsidiaries (A.12).

During this litigation, respondents Matsushita purchased MCA for $6.2 billion, the largest purchase-price ever for an American company by a foreign purchaser, a price reflecting the insurmountable entry barriers to the ranks of major film distributors in the United States (A.19,25-27).

1. Jurisdiction of the District Court

Petitioners assert a claim arising under the Constitution of the United States. The District Court has jurisdiction of the subject matter of petitioners' claim under 28 U.S.C. § 1331.

2. Procedural History

On Nov. 27, 1990 respondents publicly announced an agreement for Matsushita's purchase of MCA for $6.2 billion. Matsushita issued a formal tender offer for all MCA shares on Nov. 30, 1990, due to expire Dec. 29, 1990.

On Dec. 14, 1990 (within 2 weeks of the tender offer) petitioners sued to enjoin the acquisition, followed by an amended complaint 4 days later on Dec. 18, 1990 (A.9-18). Petitioners sought a preliminary and permanent injunction (A.17-18). In the alternative, petitioners sought divestiture in

the event the acquisition were consummated before an injunction issued (A.17). Cf. *California v. American Stores Co.*, 110 S.Ct. 1853 (1990) (divestiture remedy in private litigation). Respondents cross-moved for dismissal of the amended complaint.

On Dec. 21, 1990 the District Court granted the cross-motion and dismissed the amended complaint on its face (A.5-6).

The Court of Appeals denied petitioners' motion for an injunction pending appeal on Dec. 28, 1990. Petitioners immediately notified respondents that petitioners would proceed with the appeal and would seek divestiture if the purchase were consummated (A.36). Thereafter respondents consummated the purchase. The Court of Appeals affirmed the dismissal (A.1-4; *Young v. Matsushita Electric Ind. Co.*, 939 F.2d 19 (2d Cir. 1991)).

3. The Motion Picture Industry; Content-Control through Control of Distribution

The motion picture industry has 3 tiers: production, distribution and exhibition (A.19,23).

a. *Production*: Production consists of all elements needed to make a final copy of a film. It includes writing, filming and editing (A.19,23). Production is a highly variable expense: For a popular nationally released film, production costs may vary from $2 million for a low-budget film to $60 million or more for a blockbuster movie such as "Batman" or "Diehard" (A.19,23).

b. *Distribution*: Distribution is the process for transmitting films to theatres, videocasette retailers and cable television (A.19,24). Distribution includes film duplication, promotion, advertising, procurement of theatre bookings, and shipment of films to theatres for exhibition (A.19,25).

The entry barriers to national distribution of movies in the United States are extremely high, virtually insurmountable at the level of major distributor such as MCA (A.19,25-27). The operating costs are enormous (advertising, film duplication, a

network of offices and personnel); there is a consistent need for a stream of successful movies to finance the distribution pipeline; and many assets are intangible and irreplaceable including liaisons, entres, reputation, and access to theatres (A.19,24-31,33-34).

This combination of tangible and intangible assets often elevates the going concern value of major movie distributors into the *billions* of dollars, exemplified by Sony's payment of $5 billion for Columbia Pictures in 1989 and defendant Matsushita's payment of almost $7 billion for defendant MCA (A.19,25-26). The Sony/Columbia and Matsushita/MCA purchases are the 2 most costly purchases of *any* American companies by Japanese investors (A.19,25-26).

The motion picture industry in the U.S. is dominated by 7 major distributors which collectively control 90% of the film market (A.19,26). MCA's Universal Pictures is one of these 7 giants (A.19,33). So extreme are the entry barriers that the same 7 major distributors who dominated the industry at the advent of sound in film in the 1930's continue to do so today, with a single exception after the demise of RKO in the 1950's (A.19,26-27; time chart at A.27).

Because of these extreme entry barriers, the major film distributors are virtually irreplaceable. It is effectively impossible for a newly formed company to build the type of distribution network which is comparable to the industry giants such as MCA's Universal Pictures (A.19,25-27). There is no plausible possibility that a newly formed company could replace MCA's Universal Pictures (now sold to Matsushita) with a profitable substitute of comparable size in the same medium (A.19,33-34).

The major film distributors exercise enormous control over movie content in 3 ways (A.19,30). First, major film distributors own their own production facilities, enabling them to control content directly. Second, they distribute films of nominally-independent but tightly affiliated production companies which they effectively control. Third, they can accept or reject for distribution an occasional film by a truly independent production company (A.19,30).

c. *Exhibition*: Exhibition consists of public viewing. It includes movie theatre, videocasette, cable television and over-the-air television (A.19,31). Theatre is usually the forum of first-run release, followed by release in the remaining forums which are labelled "aftermarkets" or "ancillary" markets (A.19,31).

Although the *exhibition* tier has become more competitive,[3] it has not affected movie distribution: Movie *distribution* as such remains highly entrenched with its extreme entry barriers and controls, dominated by the same 7 major distributors (A.19,31-33).

4. The limited focus of petitioners' claim: foreign ownership of film distribution, where content-control is exercised and where entry barriers are extreme

Petitioners' claim is limited to ownership of the means of distribution of motion pictures within the United States. Control of distribution includes control of media content and is characterized by extreme entry barriers (p. 8, *supra*). The present purchase includes sale of MCA's distribution network. Petitioners do not seek to restrict ownership of the production or exhibition tiers of the film industry where entry barriers are variable or low (3 tiers of film industry discussed at pp. 7-9, *supra*).

Nor do petitioners seek to control editorial content. Editorial discretion rests with the media owner under the First Amendment. Foreign ownership, not editorial control, is the focus here. Where entry barriers are extreme, as they are in film distribution, media ownership must rest in American hands, lest foreign acquisitions displace American control of this integral branch of democratic self-government without a reasonable opportunity for a new American-owned entrant.

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3 Increased competition at the exhibition tier has resulted in relaxation of antitrust restrictions applicable to exhibition. *See, e.g., U.S. v. Loew's, Inc.*, 882 F.2d 29 (2d Cir. 1989).

REASONS FOR ALLOWANCE OF THE WRIT

Foreign control of the American mass media is an issue central to the responsiveness of the American political system and never has been addressed by this Court. Traditionally, the nation's mass media have been domestically owned and have ensured a responsive political system through vigorous journalism ultimately accountable to owners within the body politic itself. That underlying premise of American journalism for the past 2 centuries is now under seige. America's eroding capital base and enormous trade imbalances have created huge accumulations of foreign capital which, apart from ordinary industrial purchases, are acquiring control of America's mass media and an inside track on shaping the nation's political agenda.

The legislative process is not equipped to address the problem. The legislative process rests on the premise of a responsive mass media through which citizens gain information concerning government and pressure it for reform. But when the media themselves are subject to constraints which skew their accountability outside the body politic, the underlying assumptions of a legislative remedy no longer are valid. A *judicial* remedy is consistent with the judiciary's traditional solicitude for media independence. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53n.4 (1938), approved in *Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940).[4]

A. Media Self-Censorship Under Foreign Ownership

The constraints of foreign ownership lie in self-censorship by media personnel. Media personnel know the source of their paychecks. Whether consciously or subconsciously, that knowledge will influence editorial decisions. It is a form of censorship without the red-flagging of censorship activity. It does not pounce heavily like an external censor but is likely to weigh subtly upon the editorial decisions of media person-

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4 Because petitioners sue in equity, seeking an injunction without money damages, their constitutional claim is self-enforcing without a statute conferring a cause of action. *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution").

nel who know the source of their paychecks. Rare will be the explicit event of a dismissal or deletion to attract public outcry. Rather, an insidious and quiet form of internal self-censorship is the likely result of foreign acquisitions. The docile appearance of "business as usual" will conceal an insidious form of self-censorship and skewed accountability in editorial decisions.[5]

B. Judicial recognition of media self-censorship

This Court has recognized the insidious effects of media self-censorship. It has struck down restrictions which, although superficially creating the appearance of media discretion, realistically imposed self-censorship on the media. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Smith v. California*, 361 U.S. 147 (1959).

In *Gertz*, a defamation case, this Court held that private-defamation plaintiffs must prove fault. 418 U.S. at 347. This Court reasoned that, notwithstanding the appearance of media discretion, the imposition of liability without fault would induce the media to avoid protected speech as a precaution, thereby inducing "intolerable self-censorship". 418 U.S. at 340.

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5 Less than 1 year after Matsushita purchased MCA, self-censorship by Matsushita's American employees gained widespread press coverage. *N.Y.Times*, "Japanese Buy Studio, And Coaching Starts", Nov. 20, 1991, p.A1 (self-censorship by respondents' American writers to make major film praiseworthy of Japan).

Earlier Matsushita's chairman evaded questions about his censorship intentions. *N.Y.Times*, "Will Matsushita let Hollywood make Japan look Bad", Nov. 27, 1990, p.D1 at p.D7 col. 5. Three days later under pressure from the Japanese government to assuage concerns about Japanese control, Matsushita proffered that it would not interfere in MCA's content discretion. *N.Y.Times*, "Matsushita Shifts Stance on MCA", Nov. 30, 1990, P.D5, col. 3. However, the recent reports tend to confirm the common-sense reality of self-censorship by American employees under foreign ownership of American mass media.

These reports of self-censorship are unusual because they were reported at all. Most instances of self-censorship are not likely to be reported.

In *Smith*, an obsenity case, this Court held that bookstore owners could not be charged with knowledge of the contents of all books sold. An attribution of scienter violated the First Amendment because it either compelled bookstore employees to read every book sold (an impossibility) or induced "the bookseller's self-censorship" of the unread books. 361 U.S. at 154. The law's attribution of scienter effectively compelled self-censorship while superficially conveying the appearance of bookstore discretion.

So too here, foreign ownership conveys a superficial appearance of editorial discretion. Foreign owners likely will extol it in their press releases. But accountability remains overseas: Realistic editors and writers know who pays their salaries. Foreign ownership of the mass media induces a form of self-censorship as insidious as that held unconstitutional in *Gertz* and *Smith*.[6]

1. To prove self-censorship, there is no need to show overt censorship activity

Both *Gertz* and *Smith* employed a common-sense appraisal of the likely effects of the restraint at issue. Neither required an overt showing of censorship activity. Nor could they. Self-censorship is insidious and virtually impossible to illustrate with concrete examples. It is a product of both conscious and subconscious decisions of media personnel. Without requiring specific examples of censorship activity, both *Gertz* and *Smith* employed a common-sense appraisal of the restraint to overcome the superficial appearance of editorial discretion.

The same applies to foreign ownership of the mass media. Specific examples of internal self-censorship will defy illustration. Yet from a commonsense appraisal, similar to *Gertz* and *Smith*, foreign ownership is likely to induce self-

6 The involvement of governmental action in Gertz and Smith is not dispositive here. *Gertz* and *Smith* were decided under the First Amendment which applies only to official action. Here, rights of national citizenship apply to private conduct as well (pp. 20-22, *infra*). This Court's jurisprudence of media self-censorship under the First Amendment may serve as a guide for addressing the unconstitutional self-censorship here.

censorship among financially dependent employees and skew accountability of the editorial process in numerous ways, both conscious and subconscious. As in *Gertz* and *Smith*, superficially all editorial employees will have full "discretion". But realistically foreign ownership will affect media coverage through the self-censorship of editorial employees who are cognizant of the source of their paychecks.

Petitioners have alleged this in their amended complaint: that foreign ownership of mass media would result in media self-censorship by editorial employees, that this self-censorship would delimit the information received by petitioners, and that there was no replacement alternative for petitioners because high entry barriers to media ownership precluded new American-owned replacements (A. 9,15-17). Petitioners' amended complaint is facially sufficient.

2. Petitioners as viewers have rights to receive information from media free of unconstitutional self-censorship

Petitioners as media consumers have direct rights to receive media communications without unconstitutional self-censorship:

> [W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [media consumers].

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976).

This doctrine applies equally to self-censorship. Because self-censorship is insidious, it is not likely to be asserted by the media subject to it. It is especially important that media consumers protect the rights of open communication.

Self-censorship also imposes a direct burden on media consumers. *Smith*, *supra*, 361 U.S. at 153 ("the bookseller's burden would become the public's burden, for by restricting him the public's access to material would be restricted"). To deny

media audiences the right to challenge media self-censorship would be to curtail protection for parties whom this Court recognizes will bear its direct burden. Media viewers may challenge unconstitutional self-censorship, to ensure "the protection afforded . . . to the communication, to its source and to its recipients both". *Virginia State Board*, *supra*, 425 U.S. at 756.

C. Foreign ownership of the mass media is different from other ownership biases

Admittedly, all media owners have biases, and all media personnel may engage in "self-censorship" under their respective media owners. But the bias of foreign ownership is distinct.

If the ownership bias is domestic, it simply is part of the domestic political mix. Large corporations as well as individuals have rights of speech and press. *First National Bank v. Bellotti*, 435 U.S. 765, 7784 (1978). Since the mass media are supposed to enhance *domestic* political responsiveness, *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("a constitutionally chosen means for keeping officials . . . responsible"), the biases of a domestically-owned media are simply part of the domestic mix to which the media are supposed to be responsive.

Foreign ownership is different. Foreign owners are not part of the body politic which the American political process is supposed to serve. A foreign-based constituency is not the raison d'etre of democratic self-government. The media's function in ensuring political responsiveness, *Mills*, *Edwards*, *supra*, is inconsistent with foreign accountability in the media's operation. Foreign ownership negates the essential premise of domestic responsiveness in the media's function.

Foreign enterprises have a direct interest in broad array of domestic political issues. Chief among these is the regulation of foreign trade and investment. Foreign investors currently own $2 trillion in American property, a figure which has quadrupled since 1980. *N.Y.Times*, June 13, 1990, p.D2. Foreign trade also is enormous, exceeding $761 billion annu-

ally as of 1988 (1990 Stat. Abstr. of U.S. at 806: $320 billion exports & $441 billion imports). These are issues within the legislative sphere, but legislative action which is responsive to an American constituency is likely to depend upon a *domestically* accountable mass media.

The same is true of numerous other domestic issues of special interest to foreign investors. They include: the exclusion of Americans from foreign markets, *N.Y.Times*, Nov. 23, 1990 p.D1 (Japanese exclusion of American companies), the impact of foreign investment on American defense capabilities, *N.Y.Times*, June 13, 1990, p.D2 (foreign investment undermines U.S. defense independence), lack of U.S. tax enforcement against foreign companies, *N.Y.Times*, July 11, 1990 p.D1 (foreign-owned subsidiaries avoid $12 billion in income taxes by shifting profits to overseas parents), and foreign-caused erosion of America's scientific research base. *N.Y.Times*, Nov. 11, 1990, § 1, p.1 (foreign companies lure top American scientists to foreign-owned research facilities built near U.S. universities).

These types of political issues gain importance with the ever-increasing growth of foreign trade and investment. Responsive legislative action depends upon a mass media whose accountability rests within the national body politic.

1. The domestic-accountability function of the mass media

The domestic-accountability function of the media has a deep constitutional base. It has received consistent recognition by this Court. *First National Bank v. Bellotti*, *supra*, 435 U.S. at 777 (1978) (free speech is "indispensable to decision-making in a democracy"); *Mills v. Alabama*, *supra*, 384 U.S. at 219 (1966) (Mass media "serve as . . . a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"); *N.Y.Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system");

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("Speech concerning public affairs is . . . the essence of self-government."); *Roth v. U.S.*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure . . . political and social changes desired by the people.").

Foreign acquisitions of mass media are inconsistent with this accountability function. Where there are high entry barriers to media ownership, foreign acquisitions displace American ownership without a reasonable opportunity for an American-owned replacement. Such acquisitions are fundamentally inconsistent with the function of domestic accountability which has guided this Court's media jurisprudence for most of this century.

2. Neither the media's dependence on American audiences nor the availability of other American-owned media removes the problem

Neither the mass media's dependence on American audiences nor the present availability of still other American-owned media removes the dangers of foreign ownership.

The media's dependence on American audiences is not likely to remedy media self-censorship under foreign owners. There are numerous ways of skewing (or avoiding) media content without affecting popular consumption. Established media have broad latitude in selecting media content before popular consumption is affected. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400 (1969) (established media enjoy "the fruits of a preferred position").

This does not mean that "bad" content will gain an audience. Rather, it means that there are numerous ways of presenting (or avoiding) "good" content, allowing broad latitude for media self-censorship.

Nor does the availability of still other American-owned media provide a remedy. To allow a foreign acquisition on the ground that still other American-owned media remain would create a built-in count-down against American owner-

ship, which would permit foreign acquisitions until the last American-owned medium remained. That would delay a remedy as the problem worsenned. The antitrust concept of monopoly is inapposite. *Contrast* 15 U.S.C. § 2 (monopoly under antitrust laws).

D. Motion Pictures, whether designed to inform or entertain, are an integral part of the mass media and are important means of political expression

Motion pictures are integral to the constitutional concern for a responsive mass media. The entertainment and political functions of movies are inseparable. The film industry performs a vital political and propaganda function often through subtleties and entertainment:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . .
>
> The line between the informing and the entertaining is too elusive for the protection [of the Constitution]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952), quoting *Winters v. New York*, 333 U.S. 507, 510 (1948).

The serious political subjects which movies address are pervasive. A recent sampling indicates the variety of serious undertakings: the Vietnam War, pro and con ("Platoon", "Full Metal Jacket" & "Green Berets"), American civil rights movement ("Mississippi Burning" & "The Long Walk Home"), nuclear bombing of Japan ("Fat Man and Little Boy"), American deindustrialization and unemployment

("Roger and Me"), assassination of President Kennedy ("JFK" & "Flashpoint"), Cambodian Civil War ("Killing Fields"), American Civil War ("Glory"), Japanese occupation of China during World War II ("Empire of the Sun"), Watergate scandal ("All the President's Men"), apartheid in South Africa ("Cry Freedom"), British rule in Northern Ireland ("Hidden Agenda"), internment of Japanese Americans during World War II ("Come See the Paradise"), nazi genocide ("Triumph of the Spirit"), nuclear safety ("Silkwood"), military coup in Chile ("Missing"), and Brazilian rain forests ("Emerald Forest").

Even "action" or "entertainment" films often carry strong messages, underscoring that "What is one man's amusement, teaches another's doctrine". *Joseph Burstyn*, *supra*, at 501.

1. The demographic reach of motion pictures

Movie viewership is enormous and increasing. In 1989 movie theatre viewership in the United States reached 136,000,000 persons, representing 68% of the U.S. population aged 12 and over, an increase of 14% over the 123,200,000 in 1988. The number of U.S. theatre admissions has reached 1.1 billion person/admissions per year. Annual box office revenues exceeded $5 billion, almost double the 1980 figure of $2.7 billion (Motion Pic. Assoc. of America, "1989 U.S. Economic Review" at 1-2).

The aftermarkets of videocasette and cable television also are increasing. In 1989 U.S. dealers purchased more than 200 million pre-recorded videocasettes, a 48% increase over 1988's 135 million. More than 62 million American homes have videocasette players, a 68% penetration. More than 27 million American homes subscribe to pay cable services, more than double the 1982 figure of 13,400,000 (Motion Pic. Assoc. of America, "1989 U.S. Economic Review" at 9,11; 1990 Stat. Abstr. of U.S. at 550).

Movie viewership on over-the-air television is virtually limitless, as 98% of all American households have television sets (1990 Stat. Abstr. of U.S. at 550). There are more than 4 TV sets for every 5 persons in the population. *Id.*, at 844 (811 TV

sets per 1,000 persons). The average American household has a television set on more than 7 hours per day (Motion Pic. Assoc. of America, "1989 U.S. Economic Review" at 12).

In short, the reach and impact of movies are enormous. Their political function often is inseparable from their entertainment function. Movies command constitutional protection as an integral feature of the mass media. Their popularity underscores their political potential:

> "Even a critically unimpressive and commercially disappointing film is seen by a lot of people, far more than are likely to read a book on the same subject."

N.Y.Times, "Can Movies Teach History?", Nov. 26, 1989, § 2, p.18.

The modern political significance of movies has gained repeated judicial recognition:

> [F]ilmaking is protected activity . . . because of the ever increasing importance of movies to American culture. While the motion picture has always formed a vital part of the fabric of our society and our collective memories as Americans, its importance has consistently increased as the circulation of newspapers and other written materials has consistently declined. Film has in many ways, as never before, replaced the written work as a vehicle for the transmission of ideas, viewpoints and opinions. It is a vital medium that serves to stimulate important political and social debate.

Amato v. Wilentz, 753 F.Supp. 543, 551 (D.N.J. 1990).

* * *

In short, film is an integral part of our mass media whose "importance has consistently increased as the circulation of newspapers and other written materials has consistently declined". *Amato*, *supra*, 753 F.Supp. at 551. Control of film distribution within the United States includes control of film-content (p.8, *supra*). Because of extreme entry barriers, the foreign purchase of a major film distributorship network within the U.S. permits no American-owned replacement.

E. In order to ensure democratic self-government, the Constitution's inherent rights of national citizenship ensure the right of U.S. citizens to receive information through domestic mass media which are not foreign-controlled unless there is a reasonable opportunity for American-owned replacements

1. The Nature of Rights of National Citizenship: Protecting Democratic Self-Government

Under the Constitution, U.S.citizens have implied rights and immunities which "arise out of the nature and essential character of the National Government". *Twining v. New Jersey*, *supra*, 211 U.S. at 97 (1908). These rights are implied, not express, are of constitutional force, apply against private as well as governmental conduct, and are inherent in the "character" of the federal government. *Slaughter-House Cases*, 16 Wall. 36, 79 (1873). These rights, although not express, are judicially identified as "a necessary concomitant of the stronger Union the Constitution created". *U.S. v. Guest*, *supra*, 383 U.S. at 758 (1966). The most widely litigated among these implied rights is the right of interstate travel, a right never mentioned in the Constitution. *Shapiro v. Thompson*, *supra*, 394 U.S. at 629 (1969) ("all citizens [are] free to travel [interstate] throughout the length and breadth of our land").

Interstate travel is not the only such right. Rights of national citizenship also include the implied rights to speak and petition on national issues. *Hague v. CIO*, *supra*, 307 U.S. at 512 (1939) (apart from First Amendment, "the right peaceably to assemble to discuss [national] topics and to communicate respecting them . . . is a privilege inherent in citizenship of the United States") (Black & Roberts, JJ, conc'g); *Twining*, *supra*, 211 U.S. at 97 ("among the rights and privileges of National citizenship [is] the right to petition Congress for redress of grievances"); *U.S. v. Cruikshank*, *supra*, 92 U.S. at 552 (1875) (apart from First Amendment, "the right [to] petition Congress for redress of grievances, or for anything else connected with . . . the national government, is an attribute of national citizenship").

These implied rights are recognized apart from the First Amendment. They are essential to each citizen's ability to communicate with the national government in a system of democratic self-governance. *U.S. v. Guest*, *supra*, 383 U.S. at 771-72 (1966) (Harlan, J., conc'g) (rights of national citizenship "are essentially concerned with the vindication of important relationships with the Federal Government [including] . . . communicating with the Federal Government").

The present right fits this formulation in 2 respects: First, in our constitutional system, the media *are* integral to citizens' relations with government. *Mills v. Alabama*, *supra*, 384 U.S. at 219 (1966) ("a constitutionally chosen means for keeping officials . . . responsible to all the people"). Modern mass media are direct links between government and constituents, designed to ensure that "government may be responsive to the will of the people". *N.Y.Times Co. v. Sullivan*, *supra*, 376 U.S. at 269. In modern society, effective communication between government and its citizens *requires* mass media. Without it, virtually all Americans would lose most contact with the federal government. Mass media are an indispensable link in citizen-government communication.

Second, the mass media also are integral to the right of petition. Petitioning Congress long has been an inherent right of national citizenship. *Twining v. New Jersey*, *supra*, 211 U.S. at 97; *U.S. v. Cruikshank*, *supra*, 92 U.S. at 552-53. Modern mass media are conduits in this petitioning process: Citizens often seek media attention to gain the ear of government. In a society as complex and diverse as ours, the mass media are a modern means by which citizens "come to the seat of government to assert any claim" *Crandall v. Nevada*, 73 U.S. 35, 44 (1867) (interstate travel as right of national citizenship).

The District Court recognized this petition-function of the mass media:

> THE COURT: But you know, the media does play a role in some instances in the right of petition. And in fact, plays more of a role and is considered more inte-

> gral, possibly, than one would think. . . . [discussing citizen use of media to petition government].

(A. 35).

In both respects—linking the federal government with its citizens; and enabling citizens to petition—the mass media are essential links between citizens and the national government. Even Mr. Justice Harlan's narrow formulation ("communicating with the federal government"; *U.S. v. Guest*, *supra*) underscores the applicability here of the Constitution's inherent rights of national citizenship.

2. Rights of national citizenship apply to private conduct and continue to be viable sources of constitutional protection

Rights of national citizenship apply against private conduct. By contrast, most enumerated constitutional guarantees such as the First Amendment do not. Rights of national citizenship "add . . . to the [private] rights of one citizen against another", *U.S. v. Cruikshank*, *supra*, 92 U.S. at 554, commanding private as well as governmental compliance. *Id.*, at 551-54 (implied right of national citizens to petition Congress applies to private conduct); *New York National Org'n for Women v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989) ("The [implied] right [of national citizens] to interstate travel is guaranteed by the Constitution . . . with no need to show any state action or involvement. . . . [It is] assertable against private as well as governmental interference"). That the present controversy does not involve governmental action does not remove its coverage from the doctrine of national citizenship under which petitioners seek protection.

F. Limiting ownership of the nation's economically scarce mass media to American citizens does not violate the First Amendment[7]

Where there are high entry barriers to media ownership, an injunction against a foreign acquisition does not violate the First Amendment. This is so on several levels:

1. No impairment of editorial discretion nor of media diversity

The requested injunction would not infringe the media's editorial discretion. *Riley v. National Fed'n of the Blind*, 108 S.Ct. 2667, 2677 (1988) (First Amendment protects media "decisions of both what to say and what not to say").

Nor is American ownership itself likely to impair audience access to foreign material. In the broadcast media which already are precluded to foreign owners, 47 U.S.C. § 310, American ownership has not restricted access to foreign content. The broadcast media have been leaders in transnational communications.

In addition, the requested injunction would not diminish the diversity of media sources. Respondent Matsushitas' purchase of MCA does not increase media diversity; it simply transfers ownership of a source which already exists. There is no violation of the First Amendment interest in "the widest possible dissemination of information from diverse and antagonistic sources". *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

2. In mass media with high entry barriers, discrimination against foreign ownership is permissible

Discrimination against foreign owners as a class is permissible where media ownership is limited. The First Amendment protection of media *content* does not extend to unrestrained media *ownership*. Countervailing interests frequently restrict

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7 The requested injunction against foreign acquisition is governmental action for purposes of the First Amendment. *N.Y.Times v. Sullivan*, *supra*, 376 U.S. at 265.

media ownership without violating the First Amendment. *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (antitrust restriction on movie distributors' ownership of movie theatres); cf. 15 U.S.C. §§ 1801-04 (antitrust exemption for certain newspaper combinations).

Here the countervailing interest is domestic ownership of a critical means of democratic self-government. The high entry barriers to media ownership require a choice: domestic vs. foreign ownership of scarce media resources within the United States. A restriction on foreign ownership is permissible as a content-neutral enhancement of the media's role in self-government without intrusion into the editorial process. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (employer speech not protected where it conflicts with a responsive communications process in labor disputes); *Associated Press v. U.S.*, *supra*, 326 U.S. at 19-20 (1945) (news agency prerogatives not protected where they conflict with a responsive communications structure).

The interests to be protected by the requested injunction are compelling. The domestic-accountability function of the mass media is a compelling interest recognized in numerous decisions of this Court (pp. 15-16, *supra*). *N.Y.Times Co. v. Sullivan*, *supra*, 376 U.S. at 269 ("Free political discussion to the end that government may be responsive *to the will of the people* . . . is a *fundamental principle* of our constitutional system") (emp. added). Protecting rights of national citizenship, by definition, is a compelling governmental interest. *U.S. v. Guest*, *supra*, 383 U.S. at 758 ("necessary concomitant of the stronger Union the Constitution created"); *Twining*, *supra*, 211 U.S. at 97 ("essential [to the] character of the National Government").

There is no violation of the First Amendment under a content-neutral restriction on foreign ownership of economically scarce mass media.

3. A requirement of American-owned mass media would not constitute an impermissible attempt to legislate media responsiveness

Nor would the requested injunction improperly attempt to legislate media responsiveness. This Court has used language indicating that media responsiveness cannot be regulated. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("responsible press is undoubtedly a desireable goal, but press responsibility is not mandated by the Constitution and . . . cannot be legislated"). But *Miami Herald* dealt with content-control: an attempt to compel a newspaper to publish an advertisement. This violated the First Amendment by impairing editorial discretion. 418 U.S. at 256-58.

There is no such impairment here. A restriction on foreign ownership would not invade the editorial process, but instead preserves a responsive media structure under high entry barriers without impairing editorial discretion. This is consistent with the First Amendment. *Compare Associated Press v. U.S.*, *supra*, 326 U.S. at 20 (allowing content-neutral restrictions which did not impair editorial discretion), *with Miami Herald Pub. Co.*, *supra*, 418 U.S. at 256-58 (invalidating content-neutral restrictions which limited editorial discretion).[8]

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8 *Associated Press* suggests precisely this distinction. 326 U.S. at 20n.18 (permitting structural enhancement of media which is content-neutral and "does not compel AP or its members to permit publication of anything. . .").

G. A brief word on standing

Although the Court of Appeals did not address the standing issue, its brief mention here is appropriate because it goes to the Article III jurisdiction of this Court. Respondents challenged standing below, but their challenge is meritless.

Petitioners assert a right to receive information without unconstitutional media self-censorship under foreign owners. Such a right to receive information is personal to media audiences and recognized by this Court. *Virginia State Board*, *supra*, 425 U.S. at 756-57 (1976) (media consumers have individual rights to receive information without unconstitutional censorship). Petitioners allege that they are media viewers who are victims of media self-censorship under foreign ownership without a plausible opportunity for an American-owned replacement by reason of extreme entry barriers (A. 9,15-17). The constitutionality of this media self-censorship goes to the merits, not standing.

1. The commonality of petitioners' claim does not defeat standing

The fact that this right is shared by a broad cross-section of the populace does not defeat standing. Rights to receive information are "distinct" personal rights for Article III purposes, even though shared by a broad cross-section of the population. It is the nature of the right which controls, not its commonality. *Virginia State Board*, *supra*, 425 U.S. at 756-57 (1976) (media consumers have individual rights to receive information even though grievance affects entire citizenry); *Office of Communication v. FCC*, 359 F.2d 994 (D.C.Cir. 1966) (media viewers have standing to challenge media ownership even though grievance affects all viewers).

"Standing is not to be denied simply because many people suffer the same injury". *U.S. v. S.C.R.A.P.*, 412 U.S. 669, 687 (1973). Otherwise, censorship which affects all media-recipients never could gain a judicial hearing at the behest of media-recipients themselves. *Virginia State Board*, 425 U.S. at 756 ("the protection afforded . . . to the communication, to its source *and to its recipients both*"; emp. added).

2. There is no need to allege specific self-censorship activity to prevail on a self-censorship claim

As discussed above, media consumers in a self-censorship case need not allege specific instances of self-censorship activity (pp. 11-13, *supra*). This is an impossible showing in light of the insidious nature of media self-censorship and the ability to conceal self-censorship within the media's broad editorial discretion. This Court's precedent eschews the need for showing specific instances of media self-censorship. *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 340 (1974) (preventing "intolerable self-censorship" without proof of specific self-censorship activity); *Smith v. California*, *supra*, 361 U.S. at 153-54 (1959) (same) (discussed at pp. 11-13, *supra*).

The commonsense perspective from which the likelihood of self-censorship was inferred in *Gertz* and *Smith* is equally applicable here. Self-censorship in deference to one's foreign paycheck is at least as likely as self-censorship in deference to defamation laws, *Gertz*, *supra*, or obsenity statutes. *Smith*, *supra*.

3. Viewer-standing to challenge foreign ownership of broadcast stations supports viewer-standing here

Viewer standing in the broadcast arena confirms viewer standing here. Under the Communications Act, broadcast ownership is restricted to American citizens. 47 U.S.C. § 310. Broadcast audiences have standing to challenge media ownership. *Office of Communication*, *supra*.

Standing there confirms standing here: The adversity of interest between media-owner vs. media-consumer is the same; the commonality among media-consumers is the same; the disputed media ownership (foreign) is the same; the personal injury of viewers is the same.[9]

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9 Viewer-standing in the broadcast arena contains an additional prudential/policy requirement: that broadcast viewers raise only the

Nor is standing defeated by the different legal bases prohibiting foreign ownership. In broadcasting, it is statutory, 47 U.S.C. § 310; here it is constitutional. This different legal basis does not affect standing. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated").

Although not addressed by the Court of Appeals, petitioners briefly have addressed the issue of standing here because it has an Article III component which is jurisdictional. It is satisfied in this action. Petitioners are prepared to brief the issue more fully upon request of this Court.

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public interest, not their private interests. *Office of Communication*, *supra*, 359 F.2d at 1006. This does not supplant the basic Article-III requirement of injury in fact whose presence in broadcast-viewers' challenges to foreign ownership confirms its presence here.

CONCLUSION

Foreign ownership of the American mass media is an issue central to the responsiveness of the American political system and never has been addressed by this Court. The issue is gaining increased importance with ever-increasing foreign acquisitions of American media.

Where there are high entry barriers to media ownership, foreign acquisitions lock-in foreign control by precluding American-owned replacements. Foreign control is inconsistent with this Court's media jurisprudence which recognizes that mass media are an indispensable part of democratic self-government. There is an anomaly in *foreign* control of a vital means of *self*-government.

Foreign ownership results in self-censorship by media personnel in deference to foreign owners. This restricts the information available to media consumers without a reasonable opportunity for an American-owned replacement where high entry barriers bar new entrants.

The Constitution's inherent rights of national citizenship provide a remedy. They apply to private conduct and protect the relationship between U.S. citizens and the national government, including the media's integral position in that relationship. Since the media are a constitutionally chosen means for keeping governmental officials responsive, foreign acquisitions and control raise serious constitutional issues where there is no reasonable opportunity for an American-owned replacement.

Petitioners do not seek to restrict the media's editorial discretion. Petitioners focus solely on foreign acquisitions of mass media where high entry barriers preclude American-owned replacements.

The Court of Appeals disregarded this Court's media jurisprudence and erred in affirming the dismissal of petitioners'

amended complaint on its face. This Court should grant the petition for certiorari to review this critical issue of media independence.

Dated: New York, N.Y.
November 27, 1991

Respectfully submitted,

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APPENDIX

[Opinion of Court of Appeals]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1813—August Term, 1990

(Argued: July 23, 1991 Decided: July 29, 1991)

Docket No. 91-7158

CYRIL C. YOUNG, JR., JANE MANNING, JOEL BERGER, SANDY BERGER, STEPHEN NULL, MURRAY LICHTMAN and SYLVIA LICHTMAN, and all persons similarly situated as United States citizens who are viewers of motion pictures distributed in the United States by defendant MCA INC.,

Plaintiffs-Appellants,

—v.—

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORP., MATSUSHITA ACQUISITION CORP., and MCA INC.,

Defendants-Appellees.

Before:

WINTER, ALTIMARI and MAHONEY,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Robert P. Patterson, Jr., *Judge*), dismissing appellant's claim that the United States Constitution provides a national citizenship right to receive information through mass media free from foreign ownership or control, on the ground that the complaint failed to state a claim for which relief could be granted.

We affirm.

DENNIS GROSSMAN, New York, New York (Eileen King, Grossman & King, New York, New York, of counsel), *for Plaintiffs-Appellants.*

BARRY R. OSTRAGER, New York, New York (Dennis G. Jacobs, Mary Kay Vyskocil, Joseph M. McLaughlin, Simpson Thacher & Bartlett, New York, New York, of counsel), *for Defendants-Appellees Matsushita Electrical Industrial Co., Ltd., Matsushita Holding Corp. and Matsushita Acquisition Corp.*

NORMAN REDLICH, New York, New York (Theodore N. Mirvis, George T. Conway, III, Wachtell, Lipton, Rosen & Katz, of counsel), *for Defendant-Appellee MCA Inc.*

PER CURIAM:

This is an appeal from a judgment dismissing appellants' complaint for failure to state a claim for which relief can be granted. Appellants sought to enjoin the acquisition of appellee MCA Inc., a major American motion picture producer and distributor, by appellee Matsushita Acquisition Corp., a subsidiary of Matsushita Electrical Industrial Co., Ltd., a Japanese electronics manufacturing firm.

Appellants' complaint seeks to assert a right of national citizenship protecting essential features of the national government, among them an allegedly inherent right to receive information on national issues by means of mass media not accountable to foreign-owned or foreign-controlled entities. Appellants cite no case in support of their expansive concept of national-citizenship rights. We decline the invitation to issue such a decision.

"There has been a judicial reluctance to expand the content of national citizenship . . . ." *Bell v. Maryland*, 378 U.S. 226, 250 (1964) (Douglas, J. concurring). The rights of national citizenship were catalogued in *Twining v. New Jersey*, 211 U.S. 78 (1908), and include "the right to pass freely from State to State, *Crandall v. Nevada*, 6 Wall. 35; the right to petition Congress for redress of grievances, *United States v. Cruikshank*, [92 U.S. 542, 551]; the right to vote for National officers, *Ex Parte Yarbrough*, 110 U.S. 651; *Wiley v. Sinkler*, 179 U.S. 58; the right to enter the public lands, *United States v. Waddell*, 112 U.S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan v. United States*, 144 U.S. 263; and the right to inform the United States authorities of

violation of its laws, *In re Quarles*, 158 U.S. 532." *Twining*, 211 U.S. at 97.

The alleged right of U.S. citizens to receive communications through domestic media that are not subject to foreign control does not remotely resemble any extant right of national citizenship, all of which involve matters "connected with the powers or the duties of the national government." *Cruikshank*, 92 U.S. at 552.

The right appellants ask us to create is paradigmatically one for the legislative branch. As Section 310 of the Communications Act of 1934 illustrates, it belongs properly to Congress, if it chooses, to regulate the sale or transfer of American business in the communications media. *See* 47 U.S.C. § 310 (1988). Congress having elected not to regulate foreign transfer of ownership in the motion picture medium, we decline the invitation to undertake such regulation.

Accordingly, the decision of the district court is affirmed.

[Opinion of District Court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 8027

December 21, 1990

CYRIL C. YOUNG, et al

Plaintiffs,

v.

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD, et al.,

Defendants.

Before:

HON. ROBERT P. PATTERSON,

District Judge

* * *

[37]

* * *

THE COURT: . . .

I am not going to grant a preliminary injunction in this matter. I don't think the plaintiffs have the requisite standing. I don't think that they have shown that they have really suffered an actual and immediate type of **[38]** threatened injury which would result from the merger that is proposed. It just seems to me that the link between the plaintiffs and any injury that could occur is one that requires a number of other conclusions to be reached, which the Court is not prepared to reach.

I don't know when, and I don't think Mr. Gumry [plaintiffs' expert Dr. Gomery] knows or anyone knows what's going to happen in communications next in this country. Communications has been a field in which there have been

innumerable developments in recent years. And therefore, I think that the plaintiffs' grievance is really too uncertain to grant them the kind of relief they are asking for.

And I don't think that they have shown irreparable harm or the likelihood of success on the merits or a sufficiently serious question going to the merits to make them a fair ground for litigation; and the balance of hardships tipping decidedly towards plaintiffs, which is the test in the Jackson Dairy case. And in part I think it relates to the injury involved.

The movie industry is not in the direct line of political communication that, say, the television industry would be or the radio industry would be or news media would be. They are somewhat tangential to that, and therefore it seems to me the rights that are being asserted are too tangential to be Constitutional rights. I'm not prepared to **[39]** hold this is a Constitutional right that the Court should address. So I am going to dismiss the action and deny the motion for summary judgment [sic—preliminary injunction].

I don't think I need say any more. That will be the opinion of the Court. I rendered the opinion because I know you have got just several days to go before this matter becomes a fait accompli and you have your right to do in this way to appeal to a higher authority. If I didn't do that, it seems to me I've deprived of you of your right to get another judicial opinion and I don't want to do that. Thank you and I wish you all a good new year and whatever the remainder of the holiday is, a happy holiday, depending on your faith. Peace be with you.

[Order of Court of Appeals Denying Rehearing]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 91-7158

Filed Aug. 29, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of August one thousand nine hundred and ninety-one.

Present:

HON. RALPH K. WINTER
HON. FRANK X. ALTIMARI
HON. J. DANIEL MAHONEY

Circuit Judges,

CYRIL C. YOUNG, JR., JANE MANNING, JOEL BERGER, SANDY BERGER, STEPHEN NULL, MURRAY LICHTMAN and SYLVIA LICHTMAN, and all other persons similarly situated as United States citizens who are viewers of motion pictures distributed in the United States by defendant MCA, Inc.,

Plaintiffs-Appellants,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., Ltd., Matsushita Holding Corp./Matsushita Acquisition Corp., and MCA, Inc.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by plaintiffs-appellants, Cyril C. Young, Jr. et al.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

/s/ ELAINE B. GOLDSMITH

[Amended Complaint]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 90 Civil 8027 (RPP)

CYRIL C. YOUNG, JR., JANE MANNING, JOEL BERGER, SANDY BERGER, STEPHEN NULL, MURRAY LICHTMAN and SYLVIA LICHTMAN, and all other persons similarly situated as United States citizens who are viewers of motion pictures distributed in the United States of America by defendant MCA, Inc.,

Plaintiffs,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORP., MATSUSHITA ACQUISITION CORP., and MCA, Inc.,

Defendants.

VERIFIED AMENDED COMPLAINT AS A MATTER OF COURSE FOR PERMANENT INJUNCTION

(Class Action—Rules 23(b)(1)(A), 23(b)(2))

The plaintiffs, by their attorneys Grossman & King, allege that:

JURISDICTIONAL ALLEGATIONS

1. This is an action brought by citizens of the United States seeking an injunction to protect their rights and immunites as national citizens secured by the U.S. Constitution. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

DOMESTIC OWNERSHIP OF THE NATION'S MASS MEDIA; THE PLAINTIFFS' RIGHTS OF NATIONAL CITIZENSHIP

2. The plaintiffs are United States citizens seeking to enjoin the proposed sale to a foreign corporation of a major American mass medium of political expression and entertainment whose communications the plaintiffs receive. As shown below, and as an issue of first impression, this proposed sale violates the plaintiffs' rights to receive information concerning national issues through mass media whose agenda are not accountable to foreign interests, a right secured to the plaintiffs under the inherent protections of national citizenship in the Constitution.

3. As United States citizens, the plaintiffs enjoy certain inherent rights of national citizenship under the Constitution. These rights are not expressly enumerated in the Constitution but are defined by the judiciary to protect the essential features of government at the national level.

4. Previously identified as inherent rights of national citizenship are: the rights of U.S. citizens to travel interstate (not mentioned in the Constitution) and to speak and petition on national issues (apart from the First Amendment). These inherent rights apply to private as well as governmental conduct and are recognized because they are indispensable to "the nature and essential character of the National Government".

5. Also essential are mass media whose agenda and editorial decisions are not foreign-controlled. The mass media are integral to the political process, helping to define its agenda and keeping it responsive. Foreign ownership skews media accountability overseas, away from the body politic to whom the political/media processes are supposed to be responsive. Since the mass media have such enormous power in setting the political agenda of the nation, foreign accountability in that selection inherently contradicts the principles of representative government. In short, foreign ownership of the

mass media is at variance with "the nature and essential character of the National Government". The plaintiffs as national citizens have inherent rights to receive communications and information on national issues through mass media which are not accountable to foreign interests.

7. Foreign purchase of a mass medium deprives the plaintiffs of this right where there are high entry barriers to media ownership. High entry barriers preclude the replacement of the foreign acquisition with a newly formed American-owned company of comparable size in the same medium. The foreign acquisition locks-in foreign ownership (and foreign accountability) on the transfered media segment.

8. The plaintiffs, as United States citizens and part of the audience in the mass medium of motion pictures served by defendant MCA/Universal, seek to protect their rights by preventing the foreign acquisition of defendant MCA/Universal which is a significant mass medium of political information and entertainment.

THE PARTIES

9. The plaintiffs are United States citizens who are viewers of motion pictures including motion pictures which are distributed by defendant MCA/Universal. The plaintiffs regularly view movie releases in theatres, on cable television, videocassette, and over-the-air television. The plaintiffs view, and intend to continue to view, movies which address national public issues. These include movies which have been and will be distributed by defendant MCA/Universal.

10. The defendant MCA, Inc. is the present owner of Universal Pictures, a major distributor of motion pictures in the United States ("MCA/Universal"). MCA/Universal produces and distributes movies for theatre, videocassette, cable television and over-the-air broadcasting. MCA/Universal also owns MCA records, G.P. Putnam's Sons book publishers, and station WWOR-TV in New York City. Substantially all of MCA/Universal's shares are American owned.

11. MCA/Universal is a giant in the movie industry. It is one of the 7 major movie distributors in the United States. Upon information and belief: Its movies account for 15% of box office receipts in the United States in 1990. It distributed such blockbuster movies as "E.T.", "Do the Right Thing", "Jaws", "Parenthood" and "Field of Dreams". Prior to its announced purchase by Matsushita, MCA/Universal reported record-high revenues of $3.38 billion and record-high after-tax profits of $191 million for 1989. Its total assets exceed $4.2 billion.

12. The defendant Matsushita Electric Industrial Co., Ltd. is a Japanese corporation which manufactures electronics and appliances. It owns the "Panasonic" and "Quasar" trademarks. Defendants Matsushita Holding Corp. and Matsushita Acquisition Corp. are wholly owned subsidiaries of defendant Matsushita Electric Industrial Co., Ltd. (collectively "Matsushita").

13. MCA/Universal is the fourth major American movie producer and distributor to be acquired by foreign owners in the past 4 years and the third within the last year alone.

CLASS ACTION ALLEGATIONS

14. The plaintiffs sue on their own behalf and as representatives of all persons who are United States citizens who view motion pictures distributed by MCA/Universal and who will continue to view motion pictures distributed by MCA/Universal in the foreseeable future.

15. The members of the plaintiff class are so numerous that joinder of all members is impracticable. Upon information and belief, the plaintiff class numbers in excess of 100,000,000 persons whose individual listing in this action is not practicable.

16. The issues raised by the named plaintiffs are common to the plaintiff class. The common issue is the constitutional validity of the proposed sale of defendant MCA/Universal, a

major medium of political information and entertainment (with high entry barriers precluding the formation of a new American-owned replacement), to defendant Matsushita, a foreign corporation. The named plaintiffs assert that this proposed sale violates their inherent rights as national citizens to receive information concerning national issues through mass media whose agenda and editorial decisions are not accountable to foreign interests, secured to the plaintiffs through their implied constitutional rights as national citizens. This issue is common to the plaintiff class, all of whom are United States citizens and viewers of motion pictures distributed by defendant MCA/Universal.

17. The claims of the named plaintiffs are typical of the claims of the plaintiff class. See ¶ 16, *supra*.

18. The named plaintiffs' interests are common to the class. The named plaintiffs adequately represent the class.

19. The named plaintiffs will fairly and adequately protect the interests of the plaintiff class.

20. This action is brought as a class action pursuant to both Fed.R.Civ.P. 23(b)(1)(A) and 23(b)(2), as follows:

a. Rule 23(b)(1)(A) authorizes this class action. The prosecution of separate actions against the proposed Matsushita acquisition of MCA/Universal would create the risk of inconsistent or varying adjudications concerning the propriety of, or limits on, the proposed acquisition;

b. Rule 23(b)(2) separately authorizes this class action. The defendants opposing the class have acted, or propose to act, on grounds generally applicable to the entire class of movie viewers, thereby making appropriate final injunctive relief (an injunction against the Matsushita acquisition) with respect to the class as a whole. The defendants' proposed purchase agreement, if consummated, will change the ownership of MCA/Universal which distributes movies for viewing by all

plaintiffs as a class and makes appropriate final injunctive relief with respect to the entire plaintiff class.

FIRST CLAIM FOR RELIEF

(Injunction against Matsushita's acquisition of interest in or ownership of MCA/Universal)

21. The plaintiffs incorporate the allegations of paragraphs 2-20 of this complaint.

22. The defendant MCA/Universal is a major distributor of motion pictures in the United States. MCA/Universal distributes first-run motion pictures to movie theatres and, following first-run distribution, distributes motion pictures in videocassette and for broadcast on cable-television and over-the-air television. MCA/Universal is a mass medium, or a significant portion of the mass medium, of motion pictures distributed in the United States and viewed by United States citizens including the plaintiffs.

23. Movie viewers including the plaintiffs are the ultimate consumers of the motion pictures which MCA/Universal distributes. Movie viewers including the plaintiffs patronize the movie theatres, purchase the videocassettes, and view the cable television and over-the-air broadcast outlets, to which MCA/Universal distributes motion pictures.

24. The motion pictures which MCA/Universal distributes serve to inform the plaintiffs, often through an entertainment format. These motion pictures address important public issues of national concern, either subtly or explicitly, satirically or seriously. These motion pictures are part of the information and entertainment process through which the mass media including MCA/Universal communicate viewpoints and ideas on important national issues to movie viewers including the plaintiffs.

25. The plaintiffs view, and will continue to view, motion pictures distributed by MCA/Universal which includes information and viewpoints on national issues.

26. MCA/Universal intends to continue in the future its distribution of motion pictures throughout the United States, to movie theatres, videocassette retailers, cable television systems, and over-the-air broadcast outlets, all of which are used by the plaintiffs to receive information on important national issues.

27. The defendants Matsushita and MCA/Universal propose to transfer ownership and control of all MCA/Universal's shares to Matsushita, a Japanese corporation and its wholly owned subsidiaries. The Matsushita press release of Nov. 30, 1990 concerning this proposed transfer is annexed as exh. A. The cover page of the Matsushita tender offer for all MCA/Universal shares is annexed as exh. B. The cover page of the Matsushita tender offer statement is annexed as exh. C.

28. This proposed transfer of ownership will enable Matsushita to control the substantial media segment which MCA/Universal currently represents in the distribution of movies throughout the United States to movie theatres, videocassette retailers, cable television and over-the-air television.

29. There are extremely high entry barriers to the formation of a new major distributorship of motion pictures in the United States. If MCA/Universal is transferred to foreign ownership, there is no plausible possibility of replacing MCA/Universal by a newly formed and profitable American-owned substitute of comparable size in the same medium. Under the extreme entry barriers, the replacement of MCA/Universal by a newly formed and profitable movie distributor of comparable size is virtually impossible. See the declaration of Douglas Gomery, Ph.D., which is incorporated herein for all purposes.

30. If the defendants consummate the proposed sale of MCA/Universal to Matsushita, thereafter the persons at MCA/Universal who make decisions concerning the content of movies distributed by MCA/Universal will be accountable to Matsushita.

31. If the defendants consummate the proposed sale of MCA/Universal to Matsushita, thereafter the persons at MCA/Universal who make decisions concerning the content of movies distributed by MCA/Universal will exercise self-censorship in deference to Matsushita, a foreign owner.

32. If the defendants consummate the proposed sale of MCA/Universal to Matsushita, thereafter the movies distributed by MCA/Universal for viewing by the plaintiffs will be determined by persons at MCA/Universal whose decisions are accountable to Matsushita and who will exercise self-censorship in deference to Matsushita.

33. If the defendants are enjoined from consummating the proposed sale of MCA/Universal to Matsushita, the persons at MCA/Universal who make decisions concerning the content of movies distributed by MCA/Universal will not be accountable to Matsushita nor to any other foreign owners.

34. If the defendants are enjoined from consummating the proposed sale of MCA/Universal to Matsushita, the persons at MCA/Universal who make decisions concerning the content of movies distributed by MCA/Universal will not exercise self-censorship in deference to Matsushita nor to any other foreign owners.

35. If the defendants are enjoined from consummating the proposed sale of MCA/Universal to Matsushita, the movies distributed by MCA/Universal for viewing by the plaintiffs will be determined by persons at MCA/Universal whose decisions are not accountable to Matsushita nor a function of self-censorship in deference to Matsushita nor any other foreign owner.

36. The plaintiffs, as United States citizens, have inherent rights under the Constitution to receive information concerning national issues through motion picture distributors whose agenda and editorial decisions are not accountable to foreign interests.

37. There are a limited number of major movie distributorships in the United States in light of the high entry barri-

ers to media ownership. These high entry barriers preclude a plausible opportunity for replacement of a foreign acquisition by a newly formed and profitable American-owned substitute of comparable size in the same medium.

38. The defendants' proposed transfer of ownership of MCA/Universal to Matsushita which is foreign-owned violates these inherent rights of national citizenship of the plaintiffs and should be enjoined.

39. Unless permanently restrained by this Court, the defendants will consummate the transfer of ownership of MCA/Universal to Matsushita and irreparably will harm the plaintiffs.

40. The plaintiffs have no adequate remedy at law.

SECOND CLAIM FOR RELIEF

(Divestiture of MCA/Universal by Matsushita if the sale is consummated prior to issuance of an injunction)

41. The plaintiffs incorporate all prior allegations of this complaint.

42. To the extent that Matsushita shall have acquired any interest in MCA/Universal prior to the issuance of an injunction, whether such injunction issues before, during, after or without an appeal, this Court should issue an injunction requiring divestiture of MCA/Universal by Matsushita in order to protect the plaintiffs' rights as alleged in the first claim for relief.

WHEREFORE the plaintiffs demand judgment against the defendants jointly and severally:

1. Permanently enjoining the defendants (and their officers, agents, servants, employees and attorneys and those persons in active concert or participation with one or more defendants) from consummating, concluding or effecting any acquisition of defendant MCA/Universal, in whole or in part, by any one or more of the defendants Matsushita,

jointly or severally, and/or by any successor in interest thereto and from taking any further steps or actions relating to or as part of the process of consummating, concluding or effecting the proposed acquisition of defendant MCA/ Universal by any one or more of the defendants Matsushita, jointly or severally, and/or by any successor in interest thereto;

2. To the extent that the defendants have or shall have consummated, concluded or effected the acquisition of defendant MCA/Universal by any one or more of the defendants Matsushita, jointly or severally, and/or by any successor in interest thereto, ordering and directing the defendants (and their officers, agents, servants, employees and attorneys and those persons in active concert or participation with one or more defendants) to divest the defendants Matsushita and/or any successor in interest thereto of such acquisition and all the assets acquired thereby.

3. Ordering that this action shall proceed as a class action on behalf of all United States citizens who are viewers of motion pictures distributed by MCA/Universal.

4. Awarding to the plaintiffs their costs in prosecuting this action; and

5. Awarding to the plaintiffs such other relief and remedies as may be just and equitable.

Dated: New York, New York
December 18, 1990

Grossman & King
Attorneys for Plaintiffs

by: /s/ DENNIS GROSSMAN
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New York, New York 10017
(212) 599-2410
(DG 0630)

[Declaration of Petitioners' Media/Economics Expert]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 90 Civil 8027 (RPP)

CYRIL C. YOUNG, JR., JANE MANNING, JOEL BERGER, SANDY BERGER, STEPHEN NULL, MURRAY LICHTMAN and SYLVIA LICHTMAN, and all other persons similarly situated as United States citizens who are viewers of motion pictures distributed in the United States of America by defendant MCA, Inc.,

Plaintiffs,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORP., MATSUSHITA ACQUISITION CORP., and MCA, INC.,

Defendants.

DECLARATION OF DOUGLAS GOMERY, PH.D., (ATTACHED)

Attached is the declaration of Douglas Gomery, Ph.D., submitted by the plaintiffs in connection with their motion for a temporary restraining order, preliminary injunction and permanent injunction.

Dated: New York, New York
December 14, 1990

Grossman & King
Attorneys for Plaintiffs

by: /s/ DENNIS GROSSMAN
Dennis Grossman
475 Fifth Avenue (Suite 1800)
New York, New York 10017
(212) 599-2410
(DG 0630)

DECLARATION OF DOUGLAS GOMERY, Ph.D.

Douglas Gomery, Ph.D., hereby declares under the penalties of perjury and pursuant to 28 U.S.C. § 1746 that:

1. I am a Ph.D. in communication arts (major field: communications/minor field: economics) and a full professor of radio-television-film at the University of Maryland, specializing in the economics and history of the motion picture industry in the United States. I make this declaration in connection with the plaintiffs' motion for certain injunctive relief.

2. I understand that the plaintiffs' attorneys will be using this declaration in support of the plaintiffs' request, in federal court in New York, for a temporary restraining order, preliminary and permanent injunction against the purchase of MCA, Inc. ("MCA/Universal") by Matsushita Electric Industrial Co., Ltd., a Japanese corporation, and its subsidiaries Matsushita Holding Corp. and Matsushita Acquisition Corp. (collectively "Matsushita").

3. I am competent to testify as to the matters set forth in this declaration. If called upon to testify, I will affirm these matters under oath.

CURRICULUM VITAE

4. A copy of my curriculum vitae is attached as exh. A which is divided as follows: education, p.1; experience, p.2; books, pp.2-3; articles, pp.3-17; editing, pp.17-22; reviews, pp.22-24; papers presented, pp.25-31; other experience, pp.31-32; mass media interviews/quotations, p.33; consulting, p.33; honors and awards, pp.33-34; *Who's Who* listings, p.34.

SUMMARY OF CREDENTIALS

5. As mentioned above, I am a Ph.D. in communication arts (major field: communications/minor field: economics)

and a full professor of radio-television-film at the University of Maryland, at College Park, Maryland, specializing in the economics and history of the motion picture industry in the United States. This is the field to which I have dedicated my professional career for the past 20 years. At the University of Maryland, I have been a full professor for 4 years and an associate professor for 5 years in this field. From 1974-1981 I was an associate professor and assistant professor in this field at the University of Wisconsin. I received my Ph.D. in 1975 at the University of Wisconsin.

6. I have written 7 published books and 240 published articles, with an 8th book scheduled to be published in 1991. These publications primarily address the economics and history of the motion picture industry in the United States. One book has been translated into French, and a second is scheduled to be. Many of these articles have been translated into other languages including French, Dutch, Japanese, Flemish and Spanish.

7. I also am a senior researcher at the Woodrow Wilson International Center for Scholars, Washington, D.C., which is affiliated with the Smithsonian Institution. I am employed in the Center's Institute for Media Studies. My specialty at the Woodrow Wilson Center is the economics and history of the motion picture industry in the United States. My responsibilities include education and research in this field.

8. From 1986-1988 I was a member of the Board of Trustees of the American Film Institute. I chaired its Education Committee and served as members of its Budget Committee, Books Committee and Independent Awards Committee. My responsibilities included education concerning the economics and history of the motion picture industry in the United States. I rendered advice and administration in connection with this field. On its Board of Trustees, I served with such industry officials as Jack Valenti, David Wolper, Grant Tinker and Brandon Tartikoff. A copy of the American Film Institute's former letterhead indicating my membership on its Board of Trustees is attached as exh. B.

9. I have performed consulting work for the Library of Congress, U.S. Information Agency, Federal Communications Commission, National Endowment for the Arts, National Endowment for the Humanities, National Gallery of Art, Voice of America, National Geographic Society, British Broadcasting Corporation, American Film Institute, and numerous movie, television and media companies.

10. I am listed in several *Who's Who* in connection with my specialty in the economics and history of the American motion picture industry. I extensively have studied, written, consulted and lectured in this field.

11. I also am on the editorial boards of several journals which publish in the area of the economics and history of the motion picture industry in the United States.

12. I have been a visiting professor at 3 universities: the University of Utrecht at Utrecht, The Netherlands, the University of Iowa, and Northwestern University in Chicago, Ill. My teaching responsibilities as visiting professor focused on the economics and history of motion pictures and television.

ATTACHED DATA

13. Certain data concerning the motion picture industry are attached as exh. C. These consist of economic analyses by the Motion Picture Association of America, a trade group consisting of producers and distributors of motion pictures in the United States. I am familiar with these data and with the periodic publication of them. These data reasonably are relied upon as authoritative by experts in the field of the economics and history of the motion picture industry in the United States, in forming opinions and inferences upon that subject area. All data set forth in this declaration are from sources which reasonably are relied upon as authoritative by experts in the field of the economics and history of the motion picture industry in the United States, in forming opinions and inferences upon that subject area.

THE MOTION PICTURE INDUSTRY

14. The motion picture industry has a 3-tiered structure consisting of production, distribution and exhibition. To a large extent, the 3 tiers are integrated, but each tier has distinct functions and characteristics.

1. Production

15. Production consists of all elements needed to produce a final copy of a film: It includes script preparation, hiring of actors, directors and technical crew, site selection and travel, special effects and costumes, filming, film editing, and sound integration.

16. Production is a highly variable expense. For a popular nationally released film, production costs may run as low as $2 million for a small budget film or as high $60 million using a reknown cast with elaborate special effects as in "Batman" or "Die Hard". In 1989 the average cost for producing a nationally distributed movie was $23.5 million, more than double the $9.4 million figure of 1980 (exh. C at p.7).

17. Production companies also cover the full gamut of sizes. They range from small independent companies operating on low budgets with infrequent successes to the established studios which dominate the industry.

18. There are 3 categories of production companies: First, there are the major studios such as Paramount, Universal (MCA/Universal), Columbia Pictures, etc.

19. Second, there are "affiliated" smaller production companies. These affiliated production companies are independent in name only. They have ongoing affiliation agreements with the major studios which often finance the production and distribution of their films. Each of the major studios has affiliation agreements with one or more smaller production companies. Typically these affiliated production companies are owned by well-known directors or actors such as Warren Beatty, Goldie Hawn, Eddie Murphy, Clint Eastwood, Cher,

etc. These affiliated smaller production companies, although independent in form, are dependent upon the large studios: The financing for their projects virtually always depends upon distribution commitments from the major studios (distribution is discussed at ¶¶ 22-42 below) and often depends upon the major studios' financial commitments for production itself. Typically, these smaller affiliated production companies do not undertake projects unless they are pre-cleared with a major studio in order to ensure distribution as well as financing for production. Effectively, these affiliated smaller production companies are extensions of the large studios.

20. Third, there are the truly independent production companies. They usually operate on shoestring budgets with inadequate financing, doubtful distribution, and frequent bankruptcies. Occasionally, a truly independent production company will not only raise the necessary financing to produce a movie but also procure a distribution agreement with a major distributor. This scenario, although possible, happens infrequently. The rare independent production company which does succeed may be absorbed into a major studio affiliation, through the type of affiliation agreement discussed in ¶ 19. Spike Lee is an example of a rare independent success; he now has an affiliation agreement with MCA/Universal. MCA/Universal distributed Spike Lee's recent popular movie "Do The Right Thing".

21. Although the entry barriers to successful production are very high and difficult to overcome, they pale in comparison to the virtually impenetrable entry barriers of national distribution, the subject to which I now turn.

2. Distribution

22. Distribution is the essential conduit by which a movie, once produced, gains access to thousands of theatres with appropriate advertising, and then to videocasette retailers and cable television. Effective distribution is critical to the financial success of a movie.

23. Distribution of motion pictures entails the process of making prints, promotion and advertising, procurement of theatre bookings, and actual shipment of films to theatres for exhibition. After theatrical distribution comes distribution to the "aftermarkets" of videocassette, cable television and pay-per-view cable television (exhibition is discussed at ¶¶ 43-48 below).

24. The entry barriers to national distribution of movies are extremely high. The distribution barriers consist of 3 elements: huge variable costs, huge fixed costs, and intangible assets. In variable costs, distributors must incur the expenses of advertising, promotion and film duplication. These variable costs often exceed hundreds of millions of dollars per year. For *each* major release in 1989 the average advertising and print-duplication cost was $9.2 million, more than double the $4.3 million figure of 1980 (exh. C at pp.7-8).

25. In fixed costs, distributors must maintain a network of distribution, consisting of offices, personnel and their necessary liaisons. These fixed costs may exceed $30-$40 million per year per major distributor. To amortize these fixed costs (and to maintain contacts with theatre owners), the distribution network must be fed constantly with a stream of movies. It is at this point that many smaller distributors fail: After running an initial string of successful movies, they are unable to maintain the volume of successful films year-after-year which is essential to sustaining a distribution network.

26. The highest entry barriers to major distribution are on the intangible level: Movie distributors must develop and maintain liaisons within the industry, personal trust and entres, a proven track record, secure reputations for successful movies to feed a distribution pipeline, and ongoing access to movie theatres. This combination of huge costs and intangible assets often elevates the going concern value of major movie distributors into the *billions* of dollars, exemplified by

Columbia Pictures' $3.5 billion sale to Sony in 1989* and by Matsushita's pending agreement to pay almost $7 billion for MCA/Universal. (The purchases of MCA/Universal and Columbia Pictures by Matsushita and Sony are the 2 most costly purchases of any American companies by Japanese entrepreneurs.) Movie distribution in the United States is a limited field in which the entry barriers are extreme.

27. As a result, the major distributors are virtually irreplaceable: The combination of huge costs and intangible assets means that new replacements for major distributors are effectively non-existent. Although a distributor can sell its intangible assets, as MCA/Universal proposes to do here, there is no new substitute for them: It is effectively impossible for a newly formed company, starting from scratch, to build the type of distribution network which is comparable to the industry giants such as MCA/Universal. If MCA/Universal is sold to Matsushita, there is no plausible possibility that a newly formed distributor could replace MCA/Universal.

28. For the past 60 years (since the advent of sound in motion pictures), the industry has been dominated by 7 major distributors whose movies collectively generate 85-90% of the movie revenues in the United States. With a single exception (relating to 1 major distributor's going out of business), these same 7 "majors" who dominated the market in 1930 continue to do so today, 60 years later—with the same 85-90% collective control of the market. It is an extraordinary and enduring case of entrenched oligopoly with extreme entry barriers.

29. The sole exception occurred in the 1950's when RKO went out of business as a major distributor of movies, and Disney (Buena Vista) took its place. However, Disney was not a newcomer to the movie industry. It had been producing movies for 20 years and used its finances and industry-entres

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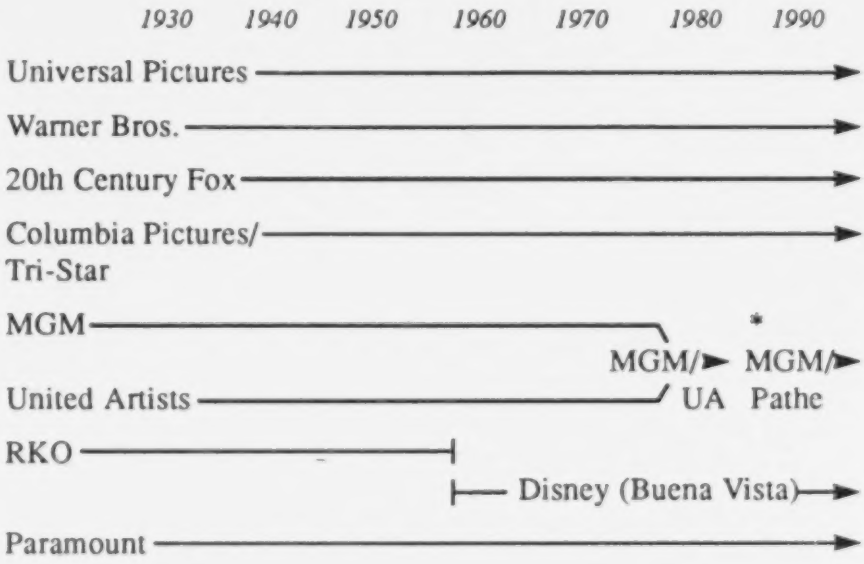
* Sony's purchase of Columbia Pictures is estimated to have cost $5 billion after including the cost of debt assumption and hiring of new management.

to build a distribution network over the next 30 years. In any event, Disney is unique: It is the sole newcomer to the ranks of major distribution since the advent of sound movies in the 1920's, using its production finances and industry entres to build a distribution network over the course of 30 years.

30. The following is a time-chart of the major distributors of movies in the United States since the advent of sound motion pictures:

Time-chart of major distributors of movies in the United States
(by current name)



* Merger of MGM and United Artists into MGM/UA.

* * *

31. This time-chart underscores the consistency in the ranks of the major distributors of movies in the United States. Except for Disney's emergence as a distributor at the approximate time of RKO's demise, the ranks of the major distributors have been consistent since the advent of sound in motion pictures. The entry barriers simply are too extreme for prospective new entrants.

32. Other large entertainment companies have been unable to break into the ranks. For example, both ABC and CBS formed movie companies with the intent of competing with the major distributors. Both failed.*

33. The time-chart also underscores the attrition from the ranks of the major distributors: RKO went out of business as a distributor in the 1950's, and MGM and United Artists were merged into MGM/UA which now is being partially liquidated, to one-half its former size, to repay debt incurred in its recent acquisition by Pathe Communications. Disney, the only new major distributor in 60 years, entered distribution on the heels of RKO's demise and financed its distribution through its extraordinary assets and industry liaisons gained during its 20 years of movie production prior to becoming a distributor. Disney is unique in the 60-year history of movie distribution in the United States.

34. The "independent" distributors (unaffiliated with a major distributor) generally have fared poorly. They are plagued with bankruptcies and lack of staying power needed to weather marginal seasons. Recent examples include Cannon Films (Chapter 11), Vestron (Chapter 11) DeLaurentiis Entertainment (Chapter 11), New World Cinema (decimated), and Management Entertainment (insolvent). Another minor distributor, Orion Films, currently has a few successes (as had Cannon Films and New World Cinema a few years ago), but Orion faces severe financial difficulties and desparately is seeking equity investors, as reported in the *N.Y. Times*, Oct. 31, 1990, p.D11. Other independent distributors have not developed a sufficient track record (Miramax; New Line).

35. There always have been independent distributors—who have failed, to be replaced by other independents who later experienced the same fate. Independent distributors fluctuate between temporary popularity and insolvency, always gaining

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* CBS' unsuccessful venture was CBS Pictures. It should not be confused with 2 joint ventures between major distributors and CBS: (1) Tri-Star, with Columbia Pictures & HBO (now controlled by Columbia Pictures), and (2) CBS/Fox Home Video, with 20th Century Fox.

favorable press coverage for the former, before succumbing to the latter.

36. As mentioned above, independent distributors often falter in maintaining the consistency of successful movies needed to finance a distribution network. These independent distributors may begin operations as independent producers of a few successful movies which the producer tried to distribute itself. But typically they are unable to maintain the relatively consistent string of successes (and expectation of further successes) needed to finance an ongoing distribution network.

37. Only the 7 "majors" consistently have withstood the market cycles and have generated consistently successful product to finance their distribution networks, maintaining control of this extremely high entry-barrier market for movie distribution for the past 60 years.

38. So entrenched are the major distributors that producers of all sizes typically rely on them. The major distributors distribute movies from all 3 categories of production companies (discussed at ¶¶ 18-20 above): their own in-house productions, the productions of small companies affiliated with the distributors' production studios, and the movies of truly independent producers. These latter independent producers, even when capable of making a movie, usually are incapable of distributing it and must rely on a major distributor for that purpose. For example, the independent production company for the popular 1990 movie "Marked for Death" relies on 20th Century Fox for distribution, as reported in the *N.Y. Times*, "Small Budget, Small Star, Big Hit", Oct. 23, 1990, p.D1.

Major Distributors and Content Control

39. The major distributors control the content of substantially all of the nation's movie viewing. They exercise this control on 2 levels: First, as distributors they select the movies which they distribute. Because of the extreme entry barriers to major distribution and their control of approximately 90% of the national movie market, the major distributors' selection of films for distribution encompasses substantially all of the movies released for national distribution.

40. Second, each of the major distributors is vertically integrated into production and owns a major production studio. As mentioned above, these major production studios both produce their own in-house productions and have affiliation agreements with select smaller production companies whose projects they finance. As a result, the major distributors, through their production studios, either determine their own in-house productions or the projects of the affiliated companies which they will finance.

Foreign Ownership

41. Traditionally, all major distributors of movies in the United States have been American-owned. This changed within the last few years: In 1985-86 Twentieth Century Fox was purchased by News Corp., an Australian company owned by Rupert Murdoch, a naturalized American citizen. In 1989 the Sony Corp. of Japan purchased Columbia Pictures. Also in 1989 Pathe Communications of Italy contracted for the purchase of MGM/UA which was consummated this year. Within the last 2 weeks, Matsushita of Japan contracted for the purchase of MCA/Universal, which is currently pending.

42. The following table indicates the present ownership (by country) of the major distributors of movies in the United States:

Table of ownership of major distributors of movies in the United States

Distributor	*Owner*	*Country of Ownership*
Universal Pictures	MCA, Inc. (pending to Matsushita)	U.S.A. (pending to Japan)
Warner Bros.	Time Warner	U.S.A.
20th Century Fox	News Corp.	U.S.A./Australia* (acquired 1985-86)
Columbia Pictures/ Tri-Star	Sony	Japan (acquired 1989)
MGM-Pathe (f/k/a MGM/UA)	Pathe Communs.	Italy (acquired 1990 per 1989 option)
Disney/ Buena Vista	Disney	U.S.A.
Paramount	Gulf & Western	U.S.A.

(*See also N.Y. Times*, "In Hollywood, Big Just Gets Bigger", Oct. 14, 1990, § 3, p.12).

3. Exhibition

43. The exhibition tier of the movie industry consists of public viewing. It assumes several forms: movie theatre, videocassette, cable television, cable television pay-per-view, and over-the-air television. Theatre usually is the forum of first-run release, followed by release in the remaining forums which are labelled "aftermarkets" or "ancillary" markets.

44. The exhibition tier has become increasingly competitive, in terms of the viewing outlets available to consumers. Whereas in 1980 theatre box office represented 80% of movie

* News Corp. is an Australian corporation owned by Rupert Murdoch, a naturalized American citizen.

revenues, now it represents only 30%. The "aftermarkets" of videocassette, cable television and over-the-air television have grown from 20% to 70% of movie receipts during that 10-year period.

45. This increased aftermarket for movies, although commanding a greater percentage of movie revenues, has not diminished theatre attendance nor revenues from theatre attendance. During the past 10 years theatre attendance has remain relatively constant, varying between 1.02 billion admissions (1980) and 1.20 billion admissions (1983, 1984), with 1.13 billion admissions in 1989 (exh. C at p.2). During that same 10-year period, revenues from theatre attendance have increased from $2.75 billion in 1980 to $5.03 billion in 1989, resulting in a slight increase after adjustments for inflation (exh. C at p.1).

46. In short, during the past 10 years, theatre attendance and box-office revenues have remained constant, while the aftermarket revenues from videocassettes, cable television and over-the-air broadcasting have increased enormously, resulting in a lower percentage of revenues (but not lower dollar revenues) from theatre admissions. Aftermarket revenues literally have exploded, without diminishing the box office take.

47. Ironically, the increased competition in the exhibition tier has permitted the major distributors to expand into it. Beginning with the Supreme Court's seminal antitrust decision in *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), certain major distributors were enjoined from owning movie theatres. However, because of increased competition among exhibitors in recent years, the major distributors have re-entered the exhibition market through governmental acquiescence. For example, Warner Bros. recently was permitted to purchase a theatre chain pursuant to the 1989 decision of the United States Court of Appeals for the Second Circuit in *U.S. v. Loew's, Inc.*

48. Significantly, this increased competition is only at the exhibition level. Although competition at the exhibition level

has permitted the major distributors to re-enter the exhibition market, movie *distribution* as such remains highly entrenched with its extreme entry barriers, dominated by the same 7 major distributors which have dominated the industry for the past 60 years.*

THE PRESENT TRANSACTION

49. I am familiar with the defendant MCA/Universal. It is one of the 7 major distributors and producers of motion pictures in the United States. In its 1989 annual report, MCA/Universal reported record revenues of $3.38 billion and record after-tax profits of $191 million (exh. D). The trade newspaper *Variety* reports that thusfar in 1990, movies distributed by MCA/Universal are responsible for 15% of the American box office market.

50. I also am aware of recent press reports that Matsushita and MCA/Universal have reached an agreement, subject to approval by MCA/Universal shareholders, for Matsushita's purchase of MCA/Universal for almost $7 billion.

51. In the event that this sale is consummated, there is no plausible possibility that a newly formed American-owned company (or any newly-formed company) could replace MCA/Universal with a profitable substitute of comparable size in the same medium. As I discussed above, the entry barriers to successful movie distribution are extremely high and, for major distributors, are virtually insurmountable. The operating costs are enormous (advertising, film duplication and a network of offices and personnel); there is a consistent need for a stream of successful movies to finance the distribution pipeline; and the assets are intangible and irreplaceable (industry liaisons, entres, reputation, access to theatres, etc.).

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* As shown above (time-chart at p. A27), the only exception is Disney which, using its large resources and liaisons as a 20-year producer, commenced distribution at the time of RKO's demise.

52. This combination of large ongoing costs, the need to finance a distribution pipeline with a stream of successful movies, and the need for extraordinary intangible assets, together with the prolonged domination of the movie market by 7 major distributors for 60 years, renders it virtually impossible to replace MCA/Universal with a profitable newly-formed company of comparable size.

WHEREFORE declarant respectfully submits this declaration for the assistance of the Court in this action.

Dated: College Park, Maryland
December 1990

/s/ DOUGLAS GOMERY
Douglas Gomery

[Excerpt from oral argument before District Court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 8027

December 21, 1990

CYRIL C. YOUNG, et al

Plaintiffs,

v.

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD, et al.,

Defendants.

Before:

HON. ROBERT P. PATTERSON,

District Judge

* * *

[22]

* * *

THE COURT: But you know, the media does play a role in some instances in the right to petition. And in fact, plays perhaps more of a role and is considered more integral, possibly, than one might think.

For instance, on abortion matters. There are large demonstrations. The demonstrations are there possibly more for the media than for any other . . . . [T]here are demonstrations outside Congress for this, that or the other measure, and the fact that they are covered on television or in the papers makes the petitions more effective.

[Fax-Letter to Respondents' Counsel]

[LETTERHEAD OF GROSSMAN & KING]

December 28, 1990

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Re: Young v. Matsushita Electric Industrial Co., Ltd.

Dear Messrs. Ostrager, Redlich & Vizcarrondo:

The Second Circuit Clerk's Office informed us by telephone this afternoon that a single Judge of the Second Circuit has denied the plaintiffs-appellants' motion for an expedited appeal and a temporary injunction pending an expedited appeal.

This is to reconfirm what is obvious from the second claim in the amended complaint—that the plaintiffs-appellants intend to continue to prosecute this matter and that, if the defendants-appellees consummate their proposed transfer of MCA to Matsushita, the plaintiffs-appellants will seek divestiture.

Sincerely,

/s/ DENNIS GROSSMAN
Dennis Grossman